Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L. STEVAS,

No. 80-2102

In the Supreme Court of the United States

OCTOBER TERM, 1981

SHEILA RENDELL-BAKER,
PETITIONER,
v.
SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,
v.
NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to The United States Court of Appeals For The First Circuit

BRIEF FOR PETITIONERS

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I

QUESTION PRESENTED

Is an ostensibly private school, to which local governments have delegated their statutory obligation to provide public education to special needs children at public expense and which is subject to extensive state regulation, subject to any constitutional constraints in connection with the provision of such education?

II

PARTIES BELOW

The Court of Appeals for the First Circuit consolidated these two appeals from the District Court for the District of Massachusetts. In No. 80-1328 below, the plaintiff-appellant was Sheila Rendell-Baker; the defendants-appellees were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), the members of the Board of Directors of the school (individually and in their official capacities),[1] Francis X. Bellotti (as Chairman of the Massachusetts Committee on Criminal Justice), and William Highgas[2] (as Executive Director of the Massachusetts Committee on Criminal Justice). In No. 80-1451 below, the plaintiffs-appellees were Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca; the defendants-appellants were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), and the members of the Board of Directors of the school (individually and in their official capacities).[3]

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[1] The individual members of the school's Board of Directors named in the *Rendell-Baker* complaint were Susan Alford, John Businger, Jackie W. Cooper, Stephen B. Goldenberg, Rodney Jackson, Joanne Neiman, James Schlesinger, Rina Wald Spence, Tonia Yee, and Edward Zarsky.

[2] William Highgas was substituted as a named party after he succeeded Robert J. Kane, who was originally named in the complaint, as Executive Director of the Massachusetts Committee on Criminal Justice.

[3] The individual members of the school's Board of Directors named in the *Klug* complaint were James W. Schlesinger, Stephen B. Goldenberg, Joseph Gartner, Joanne Neiman, David Bachrach, Rodney Jackson, Rina Wald Spence, Susan Alford, Rhoda Goodwin, Rina Hamberg, Tonia Yee, and Edward Zarsky.

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BRIEF FOR PETITIONERS

Opinions and Judgments Below

The opinion of the court of appeals for both cases, as consolidated on appeal, is reported at 641 F.2d 14 (1st Cir. 1981) and appears in the Petition for Certiorari Appendix [hereinafter "P.A."] at 1-26. The Memorandum and Order of the District Court for the District of Massachusetts in *Rendell-Baker* v. *Kohn, et al.*, No. 80-1328 below, is reported at 488 F. Supp.

764 (D. Mass. 1980) and also appears in the Petition for Certiorari Appendix. P.A. 27-39. The April 7, 1980 Memorandum and Order of the District Court for the District of Massachusetts in *Klug, et al.* v. *New Perspectives School, Inc., et al.*, No. 80-1451 below, is not reported and appears in the Petition for Certiorari Appendix. P.A. 40-57.

The judgment below in *Rendell-Baker* appears in the Petition for Certiorari Appendix. P.A. 58-59. The judgment below in *Klug* appears in the Petition for Certiorari Appendix. P.A. 60-61.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered in both appeals below on February 12, 1981. On May 4, 1981, this Court granted the petitioners' motion for an extension of time until June 12, 1981, within which to petition for certiorari. *See* 28 U.S.C. § 2101(c) (1976). The petition for certiorari was filed on June 12, 1981, and it was granted by an order dated October 13, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

Constitutional, Statutory, and Regulatory Provisions

The following constitutional, statutory, and regulatory provisions are set out hereto in Appendix A:

United States Constitution, Amendment I;

United States Constitution, Amendment XIV, Section 1;

Massachusetts Constitution, Declaration of Rights, Article VII;

United States Code, Title 42, Section 1983;

Massachusetts General Laws, Chapter 71B, Sections 1-5, 9, 10;

603 Code of Massachusetts Regulations, Section 28, Paragraphs 322.2, 502.4(i), 804.0-804.6 (1979).

Statement of the Case[4]

On October 13, 1981, the Court granted the petition for a writ of certiorari to review these two cases which involve closely-related issues and which were consolidated on appeal by the United States Court of Appeals for the First Circuit.

Petitioner in the first case is Sheila Rendell-Baker, a former teacher and vocational counselor at the New Perspectives School, Inc. [hereinafter, the "School"], one of the respondents herein. Ms. Rendell-Baker filed her complaint on July 28, 1977. She alleged, among other things, that the School, acting under color of state law and in violation of her rights under the First, Fifth, and Fourteenth Amendments and 42 U.S.C. § 1983 (1976),[5] dismissed her on January 3, 1977, without notice or hearing, in retaliation for her speech in support of a student petition concerning matters of school policy. J.A. at 76-79. Also named as defendants were members of the School's Board of Directors; Francis X. Bellotti,[6] in his capacity as Chairman of the Massachusetts Committee on Criminal Justice [hereinafter, "MCCJ"];[7] Robert J. Kane, former Executive Director of MCCJ;[8] and certain federal officials, in

[4] In this brief, the following references have been abbreviated as noted:

Appendix A to Petitioners' Brief (herein)	A.
Joint Appendix	J.A.
Petition for Certiorari Appendix	P.A.
Rendell-Baker Record	R.R.
Klug Record	K.R.

[5] Effective December 29, 1979, 42 U.S.C. § 1983 was amended to include the District of Columbia. Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284. Since this amendment did not affect the application of Section 1983 to the cases at bar, all citations and references to Section 1983 herein will be to the 1976 edition of the United States Code.

[6] Mr. Bellotti is also Attorney General of the Commonwealth of Massachusetts.

[7] The MCCJ is a state agency which, among its other duties, distributes funds received from the federal Law Enforcement Assistance Administration. Mass. Gen. Laws Ann. ch. 6, § 156 (West 1976 & Supp. 1981).

[8] While the case was pending in the district court, Mr. William Highgas replaced Mr. Kane as Executive Director and was duly substituted as a defendant. 488 F. Supp. at 785 n.1; P.A. 28 n.1.

their capacity as officials of the Law Enforcement Assistance Administration [hereinafter, "LEAA"].[9] Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343, and 1361 (1976). On April 16, 1980, the district court (Caffrey, C.J.) granted summary judgment in favor of all defendants, on the ground that the School's dismissal of Ms. Rendell-Baker did not involve state action. 488 F. Supp. at 767; P.A. 37-39. Summary judgment was affirmed by the United States Court of Appeals for the First Circuit in an opinion dated February 12, 1981. *Rendell-Baker* v. *Kohn*, 641 F.2d 14 (1st Cir. 1981); P.A. 1-26. With one exception,[10] the statement of facts contained in Part I of the court of appeals' opinion, 641 F.2d at 16-21; P.A. 2-11, is not contested by the parties.[11]

Petitioners in the second case are five former teachers and counselors[12] at the School. These five petitioners claim that they were dismissed on June 16, 1978 for their support of student free speech and educational rights and for their other speech critical of school policy and the administration, all in violation of their rights under the First, Fifth, and Fourteenth Amendments and 42 U.S.C. § 1983 (1976). *See* J.A. 23-29. Suit was commenced against the School and each of its directors on September 12, 1978. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343, and 1361 (1976). On April 7, 1980, the district court (Mazzone, D.J.) denied defendants' motion to dismiss, holding that there was "sufficient involvement by the state to meet the jurisdictional challenge." P.A. 54. The First Circuit Court of Appeals granted leave to file an interlocutory

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[9] The federal defendants were dismissed by order of the district court, R.R. at 230, and petitioners herein do not challenge that dismissal.

[10] *See* note 13, *infra*.

[11] *See* Brief of Respondents Bellotti and Highgas in Opposition to the Petition for the Writ of Certiorari at 4-9 (relying on court of appeals' opinion); Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit at 2 (incorporating by reference the court of appeals' statement of the case).

[12] Petitioners are Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca.

appeal under 28 U.S.C. § 1292(b) (1976) and consolidated the *Klug* appeal with the *Rendell-Baker* appeal. In the same opinion that affirmed the judgment in *Rendell-Baker*, the court of appeals reversed the order denying defendants' motion to dismiss in *Klug*, remanding with directions that judgment be entered dismissing the complaint. 641 F.2d 14; P.A. 1-26.

To understand the nature of petitioners' claims that the School acted "under color of state law" when it dismissed them for their speech, one must recognize the vital role of the School in the provision of public education in Massachusetts. Under Massachusetts law, all special needs students are entitled to receive suitable publicly-funded education under the supervision of the state and local governments. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 4-9. As the Massachusetts Supreme Judicial Court reaffirmed recently, Chapter 766 of the Massachusetts Acts of 1972, codified at Mass. Gen. Laws Ann. ch. 71B, §§ 1-14 (West Supp. 1981) (occasionally referred to as "Chapter 766") and the regulations promulgated thereunder, 603 Code Mass. Regs. § 28 *et seq.* (1979), create "a comprehensive and complete program of evaluation and placement for children with special education needs." *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 504, 417 N.E.2d 408, 409-10, *quoting Board of Education* v. *Assessor of Worcester*, 368 Mass. 511, 515, 333 N.E.2d 450, 453 (1975).

Under the statute, the school committee of every city, town, or school district must identify all children between the ages of three and twenty-one who, because of temporary or permanent physical or emotional disability, have special educational needs; diagnose and evaluate the special needs of each such child; prepare an individualized educational program tailored to meet those needs; and implement or arrange for the implementation of that individualized program. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 4-5. Depending upon the needs of the child, the program may con-

sist of as little as additional, in-class assistance or as much as teaching, treatment, and occupational training in a long-term residential school. Mass. Gen. Laws Ann. ch. 71B, § 2 (West Supp. 1981); A. 3-4. School districts may offer special programs themselves through existing public schools or they may contract with private schools to implement such programs. Mass. Gen. Laws Ann. ch. 71B, § 4 (West Supp. 1981); A. 9-10. However, under the regulations, the school committee must provide special education programs in the least restrictive environment possible. 603 Code Mass. Regs. § 28, par. 322.2 (1979); A. 13; *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] at 505-06, 417 N.E.2d at 408.

If the school committee decides to place the special needs child in a private school, there must be a review of that decision at least once every three months to determine if the child can be transferred to a less restrictive environment, such as a regular public school. 603 Code Mass. Regs. § 28, pars. 502.4(i), 804.2 (1979); A. 14. While the child is at a private school, the school committee must monitor the child's educational progress. Mass. Gen. Laws Ann. ch. 71B, §§ 2, 3 (West Supp. 1981); A. 4, 8-9. A private school which accepts a special needs child assigned by a school committee is required to agree to implement the special education program designed for the child and to comply with the detailed regulations promulgated under the statute. 603 Code Mass. Regs. § 28, pars. 804.0-804.6 (1979); A. 14-15. The school committee of the city, town, or school district which assigns a special needs child to a private school is required to bear the expenses associated with that placement. Mass. Gen. Laws Ann. ch. 71B, § 5 (West Supp. 1981); A. 10. In no event may a parent or guardian be charged for the educational component of a special education program. Mass. Gen. Laws Ann. ch. 71B, § 10 (West Supp. 1981); A. 12. If a parent objects to a special education program selected for his or her child, the parent

may appeal the placement, first administratively and then judicially. Mass. Gen. Laws Ann. ch. 71B, § 3; A. 7-8. Neither the statute nor the regulations promulgated thereunder indicate whether a placement appeal can be based solely on possible restraints on the free speech of teachers instructing children in a private placement.

Against this background the petitioners herein assert that the School acted under color of state law when it dismissed them from their positions as teachers and counselors for supporting student rights and criticizing school policies and administration. The School is a small non-profit institution which provides a high school program to approximately 50 students who are unable to function in a normal high school setting. J.A. 75; R.R. 39. *See also* 641 F.2d at 16-17; P.A. 3. It is located on privately-owned land in the Town of Brookline, Massachusetts, 641 F.2d at 16; P.A. 3, and is organized under the laws of the Commonwealth of Massachusetts. J.A. 73; R.R. 38 Operation of the School is under the control of a Board of Directors, no member of which is a government official or is appointed by a governmental body. 641 F.2d at 16-17; P.A. 3.

As of 1978, all 50 students enrolled at the School had alcohol, drug, or behavioral problems or other special needs, 641 F.2d at 17; P.A. 3, and had been placed in the School pursuant to Chapter 766 by the Town of Brookline, the City of Boston, or the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. J.A. 90. *See also* 641 F.2d at 17; P.A. 4. All were attending on a tuition-free basis. 641 F.2d at 17; P.A. 3. The students received a diploma certified by the Town of Brookline School Committee upon graduation. J.A. 23. The Town of Brookline maintained no suitable facilities for educating these students within its traditional public schools.[13]

[13] Although the court of appeals found no support in the record for this assertion, 641 F.2d at 17 n.2; P.A. 3-4 n.2, the affidavit of Wayne Klug, which was a part of the record below, stated, at paragraph 3: "The Town of Brookline, from which a large number of the School's students come, has no educational programs which can meet the special needs of the students which it refers to the School, within its public school system." J.A. 83.

In fiscal year 1975-76, 91% of the School's funding came from public sources. In fiscal year 1976-77, public sources accounted for 99% of the School's funds. J.A. 86. *See also* 641 F.2d at 17 n.5; P.A. 4-5 n.5. A portion of these funds was provided by the LEAA under a grant which was channeled to the School through the MCCJ. J.A. 92-104. *See also* 641 F.2d at 18-19; P.A. 7-8. The grant was to fund a vocational counseling and placement program at the School during the years 1976 and 1977. *Id.* Ms. Rendell-Baker's position was funded by this grant. J.A. 75; R.R. 39. *See also* 641 F.2d at 19; P.A. 8.

On December 2, 1976, according to the complaint in *Rendell-Baker*, students at the School petitioned its Board of Directors seeking reinstitution of the limited role played by the Student-Staff Council in personnel decisions at the School. J.A. 76. Ms. Rendell-Baker spoke in favor of the student petition, which was opposed by the School's Director, Sandra Kohn. *Id.* On January 3, 1977, according to the complaint, Ms. Kohn fired Ms. Rendell-Baker for expressing an opinion contrary to her own. *Id.* Before notifying Ms. Rendell-Baker that she was to be discharged, Ms. Kohn advised the MCCJ of her intentions. R.R. 63, 98. After the dismissal, the MCCJ advised the School that it would not approve the hiring of a replacement for Ms. Rendell-Baker until the School provided a satisfactory explanation to the MCCJ for the dismissal. R.R. 104. The School provided an explanation and, by letter to the School dated March 29, 1977, the MCCJ indicated its satisfaction with that explanation. R.R. 115. Ms. Rendell-Baker filed suit on July 28, 1977.

The dismissals in the *Klug* case occurred on June 16, 1978, shortly after petitioners had complained privately to the School's Board of Directors and publicly in a letter to the *Brookline Chronicle* about the failure of the School to provide a proper educational environment, the attempted denial of student free speech rights, and other aspects of the School and

its administration. *E.g.*, J.A. 23-27, 30-31, 59-62. Thus the criticism which led to the dismissals in the *Klug* case, like that in the *Rendell-Baker* case, related directly to the performance by the School of its duties as a provider of educational services under Chapter 766.

As noted, the Court of Appeals for the First Circuit held that the School did not act under color of state law in discharging the petitioners. Accordingly, it affirmed summary judgment in favor of defendants in *Rendell-Baker* and reversed the order denying defendants' motion to dismiss in *Klug*.

Summary of Argument

Petitioners allege that they were terminated for expressing opinions concerning matters affecting the education of their students. They would be entitled to the protection of the Fourteenth Amendment if the relationship between the School and the state were such that their dismissal may fairly be attributed to the state. The School's dismissal of petitioners may fairly be attributed to the state under two theories.

A. The state delegated to the School its statutory obligation to provide suitable public education to students placed at the School. The provision of such education is a governmental function for three reasons. First, it has been held that, for purposes of equal protection analysis, public education is a governmental function, not merely a function affected with a public interest, because it "fulfills a most fundamental obligation of government to its constituency." *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979). For this same reason, public education should be classified as a governmental function for purposes of state action analysis. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978), are not to the contrary since the Court recognized that functions such as public education might be considered sovereign functions for state action purposes without meeting

the *Jackson* test. 436 U.S. at 163-64. Second, when the state requires its political subdivisions to provide a service to a particular class of citizens, at public expense, those citizens reasonably expect that the service will be provided in accordance with constitutional standards, whether or not the state was the exclusive provider of that service in the past. The state's provision of that service pursuant to statute thus becomes a legislatively-declared sovereign function. Finally, the provision of public education in Massachusetts, including publicly-funded special education, has traditionally been a function exclusively reserved to the state. Therefore, it is a sovereign function under *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978) and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). In discharging the obligation of the state and its political subdivisions to provide suitable public education to students with special learning needs, the School was thus performing a delegated sovereign function. Therefore, in accordance with prior cases, the School was an instrumentality of the state such that its actions may be attributed to the state.

B. Because the Court has long recognized the impossibility of defining precise boundaries to the scope of the Fourteenth Amendment, it has often attempted to suggest guidelines to assist lower courts in determining where those boundaries might lie in a particular case. The guidelines often do not provide assistance, however, because they tend to focus exclusively on the indicia of state action and not on the underlying constitutional interests often competing for recognition and protection in a particular case. Where, as here, there are present such traditional indicia of state action as interdependence between the state and the private actor, the delegation by the state to the private actor of a traditional governmental function like public education, virtually complete state funding and substantial state regulation of the private actor, and total dependence of the private actor on the state as a source of business, it is necessary and proper to balance the competing

constitutional interests to determine which should prevail.

In this case, the School's privacy and associational interests are clearly subordinate to petitioners' free speech interests. Petitioners are responsible for instilling their students, through the courses they teach and the examples they set, with the values and attitudes necessary for the maintenance of a healthy democracy. They are also an indispensible source of information to parents and a vital link in the chain of communication between the classroom and the community at large. They would be unable to perform any of these functions effectively if their speech were subject to absolute censorship by school administrators.

The School's assertion of countervailing privacy and associational rights, on the other hand, is exceedingly weak. The School is entirely dependent upon the state for students and almost entirely dependent upon the state for funds. In return for students and the public funds which accompany them, the School agrees to assume responsibility for providing students the suitable education which is theirs by right. As long as the School chooses to assume this responsibility for the education of the state's public school children, it cannot reasonably expect to enjoy the privacy and associational rights of ordinary private schools. Therefore, on balance, it is appropriate in this case to afford petitioners the protection of the Fourteenth Amendment.

Argument

I. Petitioners Have Stated Valid Claims for Relief If Their Dismissal May Fairly Be Attributed to the State.

Section 1 of the Fourteenth Amendment provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1. Acting pursuant to enforcement authority conferred in Section 5 of that amendment, Congress enacted 42 U.S.C. § 1983 (1976), which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress.

One of the rights secured by the Constitution and thus protected against infringement by persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" is the right of free speech. *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939). Since petitioners maintain that they were dismissed as teachers and counselors at the School for exercising their right of free speech, their complaints state claims under 42 U.S.C. § 1983 (1976) if the action of the School in terminating their employment "may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). *See Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). For reasons set forth herein, the School's actions may be attributed to the state. Therefore, petitioners' claims should not have been dismissed for lack of state action.[14]

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[14] Although *Rendell-Baker* was decided on a motion for summary judgment, while *Klug* was decided on a motion to dismiss, the First Circuit, upon invitation of appellees in *Klug*, drew upon the record of both cases in holding that state action was not present. 641 F.2d at 16; P.A. 2-3. The court also noted that the record in *Rendell-Baker* "tends, if anything, to support rather than to weaken [the] claim of state action." *Id.*

II. The Action of the School in Dismissing Petitioners May Fairly Be Attributed to the State and Is Therefore Subject to Review Under the Fourteenth Amendment.

At least since the decision in *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court has recognized that "the prohibitions of the [Fourteenth] [A]mendment are against State laws and acts done under State authority." 109 U.S. at 13. While there is a considerable body of literature which argues that the language of the amendment itself does not require that the prohibited conduct take the form of state action, as distinguished from state inaction,[15] there does appear to be a consensus that the "state action" requirement, in whatever its proper form, reflects this nation's abiding commitment to a wide variety of privacy interests, including the right of free association, the right to own and enjoy the exclusive use of private property, and even the "right to be let alone." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See also Roe* v. *Wade*, 410 U.S. 113, 153 (1973) (Court suggests right of privacy "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action"), and the articles cited in note 15, *supra*.

The question of whether sufficient state action was present in a particular case to invoke the protection of the Fourteenth Amendment has arisen frequently. The Court has employed a wide variety of analytical approaches to find the requisite state action in an equally wide variety of contexts.[16] Conversely,

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[15] *See, e.g.*, Glennon and Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221; Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. Cal. L. Rev. 208 (1957); Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967); Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962).

[16] *E.g.*, *Nixon* v. *Condon*, 286 U.S. 73, 88-89 (1932) (exclusion of black voters fom Democratic party by party executive committee held to be state action, on the ground that the committee, for constitutional purposes, was an

claims of state action have also been rejected in various cases.[17] However, despite the wide variety of contexts in which the Court has addressed the state action issue, no prior case has involved a confluence of as many individual elements weighing in favor of state action as the case now under consideration. Those elements include the following:

1. The state, through its political subdivisions, is obligated by statute to provide suitable public education to all children, including those who have special education needs.

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agent of the state); *Marsh* v. *Alabama*, 326 U.S. 501 (1946) [hereinafter, *"Marsh"*] (enforcement of state trespass law against distributors of religious literature on the streets of a company town held to be state action, because the owners, in maintaining the town, were performing a public function); *Shelly* v. *Kraemer*, 334 U.S. 1 (1948) (state's enforcement of private agreement prohibiting transfer of property to racial minorities held to be state action, where the "full coercive power" of the state's common law was invoked to prevent a willing seller from selling to a willing buyer); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) [hereinafter, *"Burton"*] (racially discriminatory policies of private restaurant which leased space in publicly-owned parking facility held to be state action, where the state had "insinuated itself into a position of interdependence" with private restaurant); *Evans* v. *Newton*, 382 U.S. 296 (1966) (state action found where state court accepted resignation of municipal trustees of racially segregated park and appointed private trustees, on the ground that the city appeared to remain interested in the maintenance of the park and the maintenance of a park was a public function); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967) (enactment of amendment to state constitution guaranteeing private individuals the right to discriminate in the sale or lease of real property violated the Fourteenth Amendment, since it authorized discrimination).

[17] *E.g.*, *Evans* v. *Abney*, 396 U.S. 435 (1970) (no state action where state court terminates trust and enforces reverter provision in will, rather than applying *cy pres* doctrine to require trustees to admit blacks to municipal park); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (no state action where private club which held state liquor license practiced racial discrimination); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) [hereinafter, *"Jackson"*] (no state action where heavily regulated private utility which arguably enjoys state-conferred monopoly terminates customer's service for nonpayment, without prior hearing); *Hudgens* v. *NLRB*, 424 U.S. 507 (1976) (no state action where owner of shopping plaza threatens to invoke state trespass law to evict labor pickets); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978) [hereinafter, *"Flagg"*] (no state action where warehouseman, acting pursuant to state statute, satisfies lien for storage charges through sale of stored property).

2. By law, the state must provide special education in a public school, unless suitable education is unavailable there.[18]

3. When suitable education is unavailable in a public school, the state may discharge its statutory obligation by paying an ostensibly private institution like the School to provide it, in accordance with detailed regulations prescribed by the state, and subject to periodic reevaluation by the School and public authorities to determine if the student can be returned to a traditional public school.

4. Although students and parents participate in the placement decision, the law confers upon state authorities, not the student or his parents, the ultimate right to select the school which the student must attend to receive his publicly-financed special education.[19]

5. All the students enrolled at the particular school involved in this case had been placed there by public authorities.

6. Virtually all the operating funds of the school involved in this case had been supplied by the state.

7. The school involved in this case was authorized to issue high school diplomas certified by the local school committee.

8. The challenged activity of the school, *i.e.*, the firing of teachers and counselors for expressing opinions on matters affecting students' education, was intimately related to the governmental function which the state had delegated to the school.

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[18] "The statute impliedly requires, and the regulations explicitly mandate, public school education to the maximum extent possible; private school placements are permitted only as a necessary alternative." *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 505-06, 417 N.E.2d 408, 410.

[19] The regulations promulgated pursuant to the statute require the Administrator of Special Education to select the prototype and specific program for the child. 603 Code Mass. Regs. § 28, par. 322.2 (1979); A. 13. Of course, parents and the child participate in the evaluation which leads to the placement and may appeal the placement proposed. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 4-9.

Taking into account the above policies underlying the state action requirement, prior state action decisions of the Court, and the specific indicia of state action present in this case, there are at least two theories under which the School's attempt to suppress petitioners' speech was actionable under the Fourteenth Amendment.

A. *The School Was Performing the Sovereign Function of Providing Public Education.*[20]

1. *When the State Delegates a Sovereign Function to an Ostensibly Private Actor, That Actor Becomes Subject to the Fourteenth Amendment.*

One test of state action is whether the power being exercised or the service being provided by an ostensibly private actor is a sovereign function. *See Jackson*, 419 U.S. at 352-53. Motive for the delegation is not determinative. *E.g.*, *compare Smith* v. *Allwright*, 321 U.S. 649 (1944) (delegation to private actor following holding that action directly by state was impermissible), *and Nixon* v. *Condon*, 286 U.S. 73 (1932) (same), *with Marsh* (no intimation that state allowed company to act as town government for the purpose of restricting free speech rights in the town). Rather, the guiding principle in these sovereign function cases is that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

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[20] Since the Court appears to use the terms public function, sovereign function, and governmental function interchangeably, *see, e.g.*, *Flagg*, 436 U.S. at 158, 161, 163; *Evans* v. *Newton*, 382 U.S. 296, 299 (1966), petitioners shall also do so.

At the outset, it is helpful to note that the issue of whether the state delegated the performance of a public function to the School consists of two separate questions. The first, quite simply, is whether the state delegated some function. The second is whether the function delegated, if any, is a public function. In response to the first question, it is clear that the state and its political subdivisions did delegate to the School their statutory obligation to provide suitable public education to students with special learning needs.[21] Since this fact cannot seriously be disputed, petitioners proceed immediately to the question of whether the provision of such education is a public function.

In *Jackson*, the Court made two important observations concerning the determination of whether a particular function is a public function. First, it observed that, in prior cases where a function had been classified as a public function, the function was one which had been "traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 352. The second observation was that a function did not become a public function simply because it was "affected with a public interest." *Id.* at 353-54.

[21] The state's delegation to an ostensibly private school of its statutory obligation to provide publicly-funded special education must not be confused with the routine sharing of the state's educational duties with ordinary private schools. In the former case, the school is providing public education, because students are assigned there by the state to receive the special education which is theirs by right, and that education is paid for with tax dollars provided by the state. In the latter case, the school is providing private education, because students and their parents select the private school themselves, and they either pay the tuition themselves or receive discretionary assistance from other private sources. Thus, in the latter case, although the state and the private school are performing parallel functions, the state has not delegated to the school its function of providing public education. For this reason, it would not follow from the conclusion that the School in this case is subject to the Fourteenth Amendment that all private schools are. *Cf. Evans* v. *Newton*, 382 U.S. 296, 321-22 (1966) (Harlan, J., dissenting).

In *Flagg*, 436 U.S. at 159, the Court again observed that prior public function cases had in common "the feature of exclusivity." Significantly, however, in neither *Jackson* nor *Flagg* did the Court hold that the "tradition and exclusivity" route was the only one a court could take to find that a certain function was a public function. To the contrary, in *Flagg*, the Court reserved decision on whether "such functions as education," which are "not covered by our election cases or governed by the reasoning of *Marsh*," may be delegated by the state free of the "strictures of the Fourteenth Amendment." *Id.* at 163-64. This case presents that unanswered question.

There is ample support in reason and authority for the conclusion that, regardless of whether public education is a function "traditionally exclusively reserved to the State," it is a sovereign function such that the state may not delegate it free of the strictures of the Fourteenth Amendment. Moreover, even if the public function doctrine is limited to functions traditionally exclusively reserved to the state, the function of providing ordinary or special public education surely qualifies.

2. *The Provision of Public Education May Be Characterized as a Public Function Without Regard to Tradition or Exclusivity.*

Although the Court has not previously addressed the question whether public education is a sovereign function for state action purposes, it has addressed the closely analogous question of whether it is a governmental function "for purposes of equal protection analysis." *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979) [hereinafter, *"Ambach"*]. In *Ambach*, the issue was whether a state could, as a condition of issuing certification to a public school teacher, require the applicant either to be a citizen or to manifest an intention to apply for citizenship. If public education were merely "affected with a 'public interest,' " *id.* at 73, the law conditioning certification on citizenship would violate the equal protection clause. If,

however, public education were a "governmental function," *id.* at 75, it would not. The Court upheld the constitutionality of the statute, on the ground that public education is a governmental function and not merely a function affected with a public interest.

In reaching its conclusion that public education is a governmental function, the Court did not look to tradition or exclusivity, but rather "to the role of public education," *id.*, for the purpose of determining whether it " 'fulfill[ed] a most fundamental obligation of government to its constituency.' " *Id.* at 76, *quoting Foley* v. *Connelie*, 435 U.S. 291, 297 (1978). The Court not only decided that public education fulfilled such a fundamental obligation, but it reaffirmed that "education is perhaps the most important function of state and local governments." *Id.* at 76-77, *quoting Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). The Court also cited *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972), where the Court had noted that "[p]roviding public schools ranks at the very apex of the function of a State." *Ambach*, 441 U.S. at 77.

For the same reason that public education is classified as a governmental function for equal protection purposes, it should surely be classified as a governmental function for state action purposes. That reason, in short, is that "the continued good health of [our] democracy" is vitally dependent upon the way in which public education fulfills its critical mission of influencing students' attitudes toward "government, the political process, and a citizen's social responsibilities." *Id.* at 79. The same is true whether students receive their public education in a publicly-owned building, where teachers are paid directly by the state, or in a privately-owned building, where teachers are paid with funds provided by the state. In either case, public education's critical mission would be seriously jeopardized if the Fourteenth Amendment were not available to protect the providers of that education. Thus, it is unnecessary for the Court to examine tradition or exclusivity to hold that the pro-

vision of public education is a governmental function such that an ostensibly private school to which the state delegates that function becomes subject to the same constitutional obligations as the state itself, in connection with the performance of that function.[22]

There is, moreover, a second reason why it may be determined, without regard to tradition or exclusivity, that the provision of public education is a sovereign function. Chapter 766 places the responsibility for the provision of suitable public education for children with special learning needs on the state and its subdivisions. In this respect, the Commonwealth's approach to the provision of special education differs fundamentally from Pennsylvania's approach to the provision of electrical power. As the Court noted in *Jackson:*

> [W]hile the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty.

419 U.S. at 353.

The tradition and exclusivity branch of the public function test, as articulated in *Jackson* and applied in *Flagg*, was thus born of the necessity to identify public functions for state action purposes when the state itself either had denied that the

[22] The state respondents concede that "the School performes [*sic*] a public function," Brief of Respondents Bellotti and Highgas in Opposition to the Petition for the Writ of Certiorari at 10, but they appear to argue that the public function of providing special education does not encompass the firing of teachers and counselors for expressing opinions on matters affecting that education. In light of the many cases which emphasize the close relationship between teacher free speech and the educational process, *see, e.g., Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960), and in the light of the decision in *Marsh*, where the community's right to receive information was instrumental to the decision to protect plaintiff's right to distribute literature, they are surely mistaken. See also pp. 36-39, *infra*.

service was a sovereign function or had failed to obligate itself to perform it. In such cases, tradition and exclusivity are significant because they give rise to a reasonable expectation that the service will be provided in accordance with constitutional requirements, regardless of the state's efforts to disclaim responsibility. However, where the state itself assumes a legal obligation to provide a particular service, it should not be necessary to examine tradition and exclusivity to conclude that all citizens reasonably expect and have a right to demand that the service will be provided in accordance with constitutional requirements, whether the state performs the service itself or pays someone else to do so.[23] Therefore, it should not be necessary to find that the function of providing publicly-funded special education was traditionally exclusively reserved to the state in order to hold that the provision of such education is today a legislatively-declared sovereign function in Massachusetts.[24] *See Perez* v. *Sugarman*, 499 F.2d 761, 765 (2d Cir. 1974) (public function test met where state statute provides that government is ultimately responsible for the provision of the service); *cf. Gilmore* v. *City of Montgomery*, 417 U.S. 556, 561-62 (1974);[25] *Terry* v. *Adams*, 345 U.S. 461, 468

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[23] *Cf. Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 519-20, 417 N.E.2d 408, 418, where the Massachusetts Supreme Judicial Court, in holding that the payment of public funds to ostensibly private schools under Chapter 766 did not violate a prohibition in the Constitution of Massachusetts against the expenditure of public money for the aid of any private school, quoted with approval *Hager* v. *Kentucky Children's Home Soc'y*, 119 Ky. 235, 246 (1904), as follows: "That the state chooses a private institution as its instrumentality does not despoil the public nature of the appropriation, for it has been said 'that the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.' "

[24] The Massachusetts Constitution recognizes the right of the people "to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it." Massachusetts Constitution, Declaration of Rights, Art. VII; A.1.

[25] In *Gilmore*, the issue was whether the use of municipal parks and recreational facilities by private segregated school groups and nonschool

(1953) (Opinion of Black, J.) (reliance in part on a federal statute regarding state and local elections to define the type of elections which were a public function reached by the Fifteenth Amendment).

3. *The Function of Providing Public Education, Including Special Education for the Educationally Handicapped, Has Traditionally Been Exclusively Reserved to the State.*

As previously noted, the Court in *Jackson* observed that prior public function cases involved functions that had been "traditionally exclusively reserved to the State." Focusing on the first element, it has been stated too often for there to be any lingering doubt that the provision of public education is a traditional function of state and local governments. *See Ambach*, 441 U.S. at 76-78 (and cases cited therein); *National League of Cities* v. *Usery*, 426 U.S. 833, 855 (1976); *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972); *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). Moreover, although not noted by the court below, Massachusetts has a long tradition of providing suitable publicly-funded education to children who are now recognized as having special education needs. Thus, as early as 1848, in a report to the state legislature, Samuel Gridley Howe wrote:

> Massachusetts admits the right of all her citizens to a share in the blessings of education; she provides it liberally for all her more favored children; *if some be blind or deaf, she still continues to furnish them with special instruction at great cost;* and will she longer neglect the poor idiot,—the most wretched of all who are born to her,—those who are usually abandoned by their fellows,

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groups that discriminated on the basis of race involved state action. In an earlier decision in the same case, noted in the Court's opinion, the lower court had concluded that, under an Alabama statute, joint provision of recreation facilities by the YMCA and the city was a statutorily-declared public function for state action purposes. 417 U.S. at 561-62, *quoting Smith* v. *Young Men's Christian Association*, 462 F.2d 634, 641-42 (5th Cir. 1972), *aff'g as modified, id.*, 316 F. Supp. 899 (M.D. Ala. 1970).

> —who can never, of themselves, step up upon the platform of humanity,—will she leave them to their dreadful fate, to a life of brutishness, without an effort in their behalf?

Harbor Schools, Inc. v. *Board of Appeals*, 5 Mass. App. Ct. 600, 606 n.7 (1977), *quoting* 1848 Sen. Doc. No. 51, at 52 (emphasis added).[26] The Legislature responded to Howe's plea for the extension of special education to include "idiots" and appropriated money that year for that purpose. Res. 1848, c. 65.

In its earliest form, Chapter 766 dates back to 1919, when the Legislature passed "An Act To Determine The Number Of Children Retarded In Mental Development And To Provide For Their Instruction." St. 1919, c. 277. This statute required the school committee of every town to ascertain annually, under regulations prescribed by the board of education and the director of the commission on mental diseases, the number of children in its public schools who were three or more years retarded in mental development. In towns where there were ten or more such children, "special classes" for their instruction "adapted to their mental attainments, under regulations prescribed by the board" were required. In 1954, the statute was amended to require special classes in towns where there were five or more mentally retarded children and to provide for the discretionary establishment of special classes in towns where there were less than five such children. St. 1954, c. 514, § 5.

Since 1930, Massachusetts towns have been required to provide for the special education of physically handicapped children by "employ[ing] a teacher or teachers, on full or part

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[26] In that case, the court held that a private, nonprofit school which is qualified to accept Chapter 766 placements is serving an " 'educational purpose which is. . . public,' " thereby exempting the school from local zoning laws. *Id.* at 607, *quoting* Mass. Gen. Laws ch. 40A, § 2, as amended by St. 1959, ch. 607, § 1.

time, who shall, with the approval in each case of the department [of education] and the...commissioner of public welfare, offer instruction to said children in their homes or at such places and under such conditions as the [school] committee may arrange." St. 1930, c. 368. Since 1960, Massachusetts has required the same special education for any child "so emotionally disturbed as to make attendance at a public school not feasible." St. 1960, c. 750, § 1. Thus, special as well as ordinary public education has had a long tradition in Massachusetts.

The second element of the *Jackson* test is exclusivity. As used in *Jackson*, the term seemed to refer to the extent to which the state, in the past, had reserved to itself the performance of a particular function. As used in *Flagg*, however, the term exclusivity may refer to the extent to which the private entity is the only one presently performing that function. In whichever sense the term is used, however, the exclusivity requirement is also satisfied in this case.

Thus, considering the first possible meaning of the term exclusivity, it does not appear that there was ever a time when individuals in need of, but unable or unwilling to pay for, special education in Massachusetts had a right to look to any institution other than the state for such education. In this sense, the power and the duty to spend public funds to provide suitable education to every child in the Commonwealth has always exclusively resided in and been an exclusive obligation of the state.

On the other hand, if exclusivity refers to the extent to which an ostensibly private entity has become the exclusive provider of a particular service traditionally provided by the state, the exclusivity requirement is still satisfied. The School is the only institution to which its students can go to receive suitable public education.[27] Of course, students assigned to the School may

[27] As noted, however, parents do have the right to appeal if they are dissatisfied with a proposed placement. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 7–8.

choose to return to their local public school or to enroll in a traditional private school. However, since they could not have been removed from the public school system in the first place if the system had been capable of meeting their educational needs, *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 514, 417 N.E.2d 408, 415, and since "the statute does not permit the reimbursement of money which is spent for a child who unilaterally enrolls in private school," *id.*, the exercise of either option would require the student to choose between a suitable education and a public education, notwithstanding that the statute guarantees him both. Thus, just as persons who wished to distribute literature in Chickasaw, Alabama, could do so only on streets owned by the Gulf Shipbuilding Corp., *see Marsh*, and just as voters who wished to participate meaningfully in the election of county officials in Fort Bend County, Texas, could do so only by voting in the Jaybird Democrat elections, *see Terry* v. *Adams*, 345 U.S. 461 (1953), students assigned to the School who wish to receive the suitable public education which is theirs by right can receive it only at the School and nowhere else.

In short, whether the exclusivity requirement refers to the historical role of the state in performing a particular function to the exclusion of everone else, or to the extent to which a private actor has obtained a monopoly over the performance of that function today, the exclusivity element of the *Jackson* test, as well as the tradition element, is satisfied. Therefore, the provision of publicly-funded special education is a sovereign function such that the state may not delegate the performance of that function to an ostensibly private school free of the strictures of the Fourteenth Amendment.

B. *Under an Appropriate Balancing of Interests, Petitioners' Free Speech Rights Warranted Greater Protection Than the School's Privacy Rights.*

1. *In Determining the Presence of State Action in a Particular Case, the Court Should Look Not Just to Traditional Indicia of State Action But to the Specific Interests Competing for Consideration in the Context of the Particular Case.*

In one sense, the history of the state action requirement has been a history of the Court's attempt to define appropriate limits to the scope of the Fourteenth Amendment. This search for limits surely does not reflect the Court's philosophical objection to the amendment's primary purpose of protecting vital interests such as equal protection, free speech, and due process, but rather a well-founded concern for the protection and preservation of the often conflicting fundamantal rights of free association, privacy, and the right to own and enjoy the exclusive use of private property.

Although the Court has long recognized the impossibility of ever defining precise limits to the scope of the Fourteenth Amendment, *e.g.*, *Burton*, 365 U.S. at 722; *Reitman* v. *Mulkey*, 387 U.S. 369, 378 (1967), it has often attempted to suggest guidelines to help lower courts and interested individuals determine whether those limits have been reached or exceeded in any particular case. Experience has shown, however, that the guidelines will not always suggest the proper, or even consistent, results in all cases. For example, on various occasions, the Court has suggested that the following factors are to be taken into account in determining state responsibility for ostensibly private conduct:

1. *Whether the state's involvement was "significant."* *Burton*, 365 U.S. at 722. The distinction between significant and insignificant state involvement has not always been followed, however. For example, in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), the Court, in *dictum*, stated that the furnish-

ing of essential services such as electricity, water, and police and fire protection to segregated private schools would not violate the Fourteenth Amendment because, *inter alia*, such services were "necessities of life," not readily available from other sources. *Id.* at 465, *quoting Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972). However, for that very reason, the state's provision of such services to private segregated schools would appear to be extremely significant in promoting and perpetuating a dual school system. *See* note 32, *infra*.

2. *Whether the state had compelled, rather than merely permitted, the challenged activity. Flagg*, 436 U.S. at 164-65. However, the Court itself has apparently not always found it possible to adhere to the distinction between permission and compulsion. *See, e.g., Reitman* v. *Mulkey*, 387 U.S. 369, 381 (1967) ("Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market"); *Burton*, 365 U.S. at 725 ("By its inaction, the Authority . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination"). Moreover, it is not difficult to hypothesize other cases which would place enormous strain on the proposed dichotomy between permission and compulsion. For example, one would hope that state inaction, *simpliciter*, would not insulate the private utility in *Jackson* from liability if it terminated service to minorities or to opponents of a proposed rate increase. *See Jackson*, 419 U.S. at 374 (Marshall, J., dissenting).

3. *Whether there was a nexus between the state's involvement and the challenged activity. Jackson*, 419 U.S. at 351. However, the absence of a nexus between the state and the exclusion of black people from the Democratic party was

not dispositive in *Smith* v. *Allwright*, 321 U.S. 649 (1944), where the state seemed to be involved in virtually all aspects of primary elections, except the establishment by the Democratic party of membership requirements.[28]

4. *Whether, in public function cases such as* Smith v. Allwright, id., *the function under consideration had been "traditionally exclusively reserved to the State." Jackson*, 419 U.S. at 352. However, whether a function is deemed to be traditionally exclusively reserved to the state may often depend upon how broadly or narrowly one chooses to define the function. For example, the "conduct of...elections themselves," *Flagg*, 436 U.S. at 158, may fit the definition of a public function, but prescribing the membership rules for a political club or party probably would not meet the *Jackson* test.

5. *Whether the challenged conduct had received regulatory approval after a hearing, as distinguished from regulatory approval without a hearing. Compare Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 462 (1952) *with Jackson*, 419 U.S. at 355-56. However, that distinction was not dispositive of the state action issue in *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 119-20 (1973).

6. *Whether the private entity involved had taken on all the attributes of the state, or only some of those attributes. Compare Marsh with Hudgens* v. *NLRB*, 424 U.S. 507 (1976). However, the result in *Marsh* would surely have been the same even if the owner of Chickasaw, Alabama, had not supplied Chickasaw residents with, for example, sewage treatment services. Conversely, if the owner of a shopping plaza which admittedly had not taken on all the attributes of a town sought enforcement of covenants inserted by him in all retail store leases prohibiting plaza merchants from hiring or selling to

[28] While *Smith* v. *Allwright* was decided under the Fifteenth Amendment, rather than the Fourteenth, the state action issue was the same.

minorities, one would hope the case would not be summarily dismissed on the authority of *Hudgens*.

As the foregoing examples illustrate, it is almost as difficult to formulate useful guidelines in the state action area as it is to define precise boundaries. This should not be at all surprising, however, since rights such as equal protection, free speech, and due process, on the one hand, and free association, privacy, and private property, on the other, all occupy lofty positions in our hierarchy of values. When they clash, as they inevitably will, it would be remarkable indeed if, in each case, the interest to which a reasoned judgment would assign greater weight invariably coincided with the presence or absence of any one or more traditional indicia of state action. For example, if the private utility in *Jackson* refused to extend service to opponents of a proposed rate increase, all the indicia of state action (including the absence of a nexus between the state and the decision to terminate service) would be identical to those in the actual case. Nevertheless, a reasoned analysis would suggest that the free speech rights of the terminated customers in the hypothetical case would be entitled to more consideration than the due process rights of the terminated customers in the actual case. This is not to say that the customers in the hypothetical case would necessarily prevail or that, on some abstract scale, free speech is more important than due process. It is only to suggest that the weight any particular interest should be given, relative to any countervailing interest, will depend upon the totality of the circumstances in which that right is asserted. Therefore, guidelines which focus only on the indicia of state action, to the exclusion of the underlying interests competing for recognition and protection in a particular case, are likely to be inadequate.

Perhaps in recognition of the fact that the context in which a right is asserted may sometimes affect the weight it should be given, the Court, on occasion, has frankly spoken in terms of balancing competing interests. For example, in *Marsh*, 326 U.S. at 509, Justice Black, speaking for the Court, stated:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.... In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of state statute. (Footnote omitted.)[20]

Some lower courts are also coming to the realization that "[s]imply totting up the number of state contacts is no longer a proper way of resolving close state action questions." *Edwards* v. *Maryland State Fair and Agricultural Society*, 476 F. Supp. 153, 156 n.4 (D. Md. 1979), *modified on other grounds but affirmed as to state action determination*, 628 F.2d 282 (4th Cir. 1980). In *Edwards*, the issue was whether a private, nonprofit, tax-exempt corporation which was designated by the state to operate a state fair and whose operations were state-subsidized was a state actor, for purposes of restricting the distribution of religious literature at the fair to booths. In holding it was, the court stated:

> Having reviewed these more recent approaches to state action analysis, the Court must now apply a balancing analysis which evaluates not only the overall relationship between the state and private entities (regardless of whether it is termed a "symbiosis" or a "nexus") but also the relationships between competing liberty interest and constitutional values. Utilizing this analysis, the Court finds that the relationship between the State of Maryland

[20] *See also Burton*, 365 U.S. at 722, where the Court stated: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

and the Agricultural Society is sufficient to find that the enforcement of the booth rule constitutes state action. 476 F. Supp. at 158.

Petitioners submit that, at least on those occasions where, as here, there are present such traditional indicia of state action as interdependence between the state and the private entity, substantial state funding and regulation, the delegation by the state of a traditional governmental function like education, and the virtually complete dependence of the private entity on the state for all its business (and hence its existence),[30] it is necessary and proper for the Court, in determining the applicability of the Fourteenth Amendment to particular conduct, to look beyond such indicia to the interests competing for protection, whether or not any specific, previously established guideline for determining state action is satisfied.[31] Those in-

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[30] Also, in the *Rendell-Baker* case, the state, through an MCCJ official, had evidenced its belief that it had some responsibility for the hiring and firing of employees whose positions were funded by LEAA grants. R.R. 104; 641 F.2d at 27-28; P.A. 25.

[31] Several commenators have argued that the Court should abandon entirely its search for indicia of state action, because state action is present whenever the state, in performing its primary function of defining right-duty relationships, favors one interest over another. Thus, they argue that the proper inquiry is not whether state action is present, but whether unconstitutional state action is present. They further argue that the question can be answered only by a balancing of the interests at stake. *See, e.g.*, Glennon and Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221; Horowitz, *The Misleading Search for "State Action" under the Fourteenth Amendment*, 30 S. Cal. L. Rev. 208 (1957); Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967); Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Note, *State Action and the Burger Court*, 60 Va. L. Rev. 840 (1974). Whatever the merits of such arguments, a balancing approach can be employed in the present case and others like it, where substantial indicia of state action *are* present, without abandoning, or even compromising, the notion that the state must have some significant, affirmative involvement before the safeguards of the Fourteenth Amendment come into play.

terests must then be balanced to determine which should prevail. If in a particular case the Court determines that the plaintiff's interest in a fundamental right such as equality can be protected with minimal interference with the defendant's interest in privacy or free association, as was the case in *Burton*, the Court should hold, as a matter of law, that the defendant's conduct is subject to scrutiny under the Fourteenth Amendment. Conversely, if the Court determines that a substantial invasion of one person's privacy rights would be required to protect another person from a *de minimis* impairment of a fundamental right, the Court should hold, as a matter of law, that the Fourteenth Amendment is not applicable.[32]

The proposed analysis offers two principal benefits:

1. It acknowledges that the true significance of any particular indicia of state action cannot be determined in a vacuum, but only with reference to the interests competing for recognition and protection in a particular case. For this reason, identical indicia of state action may warrant a determination of state responsibility under some circumstances but not others. For example, in *Jackson*, the fact that the state

[32] Such might be the case, for example, if an omitted child claimed "state action" in the state court's allowance of his father's will, from which he had allegedly been excluded for marrying a woman who was not born of the same religion. *Cf. Gordon* v. *Gordon*, 332 Mass. 197, 124 N.E. 2d 228, *cert. denied*, 349 U.S. 947 (1955). The proposed analysis might also explain the statement in *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973), to the effect that a state does not violate the Constitution by providing necessities of life to a racially segregated private school. As *Norwood* itself reaffirmed, the right of parents to send their children to private school is itself a fundamental right. 413 U.S. at 461. To deprive any private school of the necessities of life would obviously constitute the most severe form of impairment of that right. Thus, under an appropriate balancing approach, essential services such as electricity, water, and police and fire protection may be provided, even though less significant forms of aid such as textbooks may not.

arguably conferred a monopoly upon a private utility and closely regulated its activites did not compel the conclusion that the utility's decision to terminate a customer's service for nonpayment was attributable to the state. Given the same combination of factors, however, it may be appropriate to hold the state responsible for the utility's hypothetical decision not to extend service to minorities or to persons who speak at a public hearing in opposition to a proposed rate increase. The reason is not that equality or free speech is more important on some abstract scale than the due process rights of delinquent customers, but because the right to receive payment for the provision of service is more fundamental to our notion of private property than the right to withhold service from a customer who is ready, willing, and able to pay. Thus, requiring a private utility to provide what in effect would be free service to nonpaying customers would be a far more substantial invasion of the utility's property rights than requiring it to provide service to minorities or opponents of a proposed rate increase.[33]

2. At present, lower courts tend to detect the presence of state action through the mechanical process of first identifying points of contact between the state and the challenged conduct and then trying to find other cases, involving similar contacts, from which they can reason by analogy. What is lacking, and what the proposed analysis will provide, is a rational framework for decision. Once the court determines that substantial indicia of state action are present, instead of trying to decide if the case is more like one case or another, it can

[33] By the same token, to the extent that society benefits from the fact that the private sector continues to bear primary responsibility for the building of power plants, there would be more disincentive to such socially desirable activity if the owners were forced to provide free power to nonpayers than if they were forced to sell power for a profit to anyone who desired to buy it.

move on to the less mechanical and more meaningful task of sorting out and weighing the competing interests at stake, to determine which is more deserving of protection upon the facts of the particular case at hand.[34] Since there are bound to be some cases where the interests will be in close balance, the decision-making process will still often be difficult. To the fullest extent possible, however, it will at least be forthright and rational.

2. *Since Substantial Indicia of State Action Are Present and Since Petitioners' Free Speech Rights Are More Deserving of Protection in This Particular Case Than the School's Privacy Rights, Petitioners Are Entitled to the Protection of the Fourteenth Amendment.*

Applying the proposed analysis to the present case, it is immediately apparent that there are substantial indicia of state involvement. In fiscal year 1975-76, 91% of the School's funding was derived from public sources. By 1976-77, this figure had risen to 99%. As of 1978, all fifty of the School's students had been placed there by the Town of Brookline, the City of Boston, or the Drug Rehabilitation Division of the

[34] Note, however, that no elaborate sorting or weighing would be required where the state, by statute, sought to compel conduct which abridged rights protected by the Fourteenth Amendment, such as by requiring black children to attend separate schools. In such a case, it is immediately apparent both that traditional indicia of state action are present, and that the statute seriously impairs not only equality rights but also the privacy and free association rights of members of all races who do not wish to remain separate. The statute would therefore clearly be unconstitutional. Note also, as this hypothetical illustrates, that cases in which the state attempts by statute to abridge the fundamental rights of any class of citizens do not differ analytically from other state action cases. They simply occupy an extreme position on the spectrum.

Massachusetts Department of Mental Health, at public expense, in fulfillment of the state's statutory obligation to provide public education to children with special learning needs. Local school committees prepared a special education plan for each child assigned to the School. The School was not only required by law to implement these individualized plans, but it was also required to comply with an extensive set of state regulations. While a child was at the School, the local school committee which had placed the child was required to monitor the child's progress and the School's compliance with that child's educational plan. Every three months, the School was required to reevaluate the situation to determine if the child could be transferred to a less restrictive environment. An annual reevaluation by state authorities was also required. In short, except for the fact that the state apparently chose not to become involved in the School's hiring and firing decisions,[35] it would be difficult to imagine a case where a state could be more intimately involved with the activities of an ostensibly private school.

Under the proposed analysis, however, it does not necessarily follow from the fact that the state has substantial involvement with the School and the education provided there that everything the School does should be attributed to the state for purposes of the Fourteenth Amendment. Before any conclusion can be reached regarding any particular activity, the competing constitutional interests at stake must be identified and weighed.

The identification of these interests in this case is not difficult. The School claims privacy and associational rights, including the right to hire and fire employees. Petitioners have a substantial professional interest in being able to express opinions on matters affecting the education of their students.

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[35] As previously noted, in *Rendell-Baker* it appeared that the state had even become involved in that function. *See* note 30, *supra*.

Their interest coincides with the interest of students, parents, and taxpayers in having the benefit of such opinions. It conflicts, however, with the School's asserted privacy and associational rights. The difficult task for the Court, in this or any other case where a choice must be made between competing constitutional interests, is determining which interests should prevail.

There are several reasons why petitioners' rights are clearly entitled to priority in this case. First, this Court has repeatedly recognized not only the vital function of public education in preparing children to participate in our democratic society, *see Ambach*, 75-78; *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954), but also the critical role of teachers in carrying out that function. Thus, in *Ambach*, 441 U.S. at 78-79, the Court stated:

> Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school .... Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy. (Footnotes omitted.)

For these reasons, the Court held that public school teachers perform a task "that go[es] to the heart of representative government." *Id.* at 75-76, *quoting Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973).

Two other related themes also emerge from the Court's decisions dealing with First Amendment rights of public

school teachers. The first such theme, building upon the role of teachers in society, emphasizes the importance of preserving First Amendment rights in the classroom. Thus, in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), the Court stated:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, [364 U.S. 479, 487 (1960)]. The classroom is peculiarly the "marketplace of ideas."

The second related theme emphasizes the importance of preserving the constitutional rights of public school teachers to express opinions outside the classroom on matters of educational policy, especially when their opinions may serve to balance the opinions of school administrators. This theme was clearly articulated in *Pickering* v. *Board of Education*, 391 U.S. 563, 571-72 (1968) [hereinafter, *"Pickering"*], where the Court stated:

> More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should

> be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

It is against this background that petitioners assert their rights to express their professional opinions, in private and in public, concerning the educational process and how it might be improved.

Relative to students, parents, and the community, petitioners occupy the same positions as any other public school teachers or counselors. Students who attend the School were assigned there by state authorities to receive, at public expense, the public education which the law guarantees to them. They did not choose to attend the School in the same sense that private school students choose the school they attend.[36] Nor did their parents choose to send them to an institution where their teachers would not be free to comment upon the educational process in general or their children's progress and needs in particular.[37] Finally, taxpayers are as legitimately concerned about the use of their tax dollars to support the School's operations as about the use of their tax dollars to support traditional public schools. If petitioners were not free to comment upon educational matters concerning the School, taxpayers would be deprived of the voices of the only educators in day-to-day contact with a sizable class of beneficiaries of their tax dollars. Their sole source of information from within the School would then be School administrators, who have a vested interest in maintaining the *status quo*. *See Pickering*, 391 U.S. at 571-72.

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[36] "Those children placed in private schools under c. 766 are placed not by choice but by necessity." *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 516, 417 N.E.2d 408, 416.

[37] As previously noted, however, parents do have certain appeal rights if they are dissatisfied with a particular placement. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981).

Thus, petitioners serve not only as role models for students and as liaisons between students, parents and administrators, but also as a critical link in the chain of communication between the classroom and the community.

Petitioners are, of course, uniquely qualified to perform all these functions, by virtue of their training, their experience, their proximity to their students, and their familiarity with student needs. Moreover, they properly feel a professional and civic obligation to speak out, both because they serve as role models for their students in the teaching of social responsibility, *see Ambach*, 441 U.S. at 79, and because they have a professional interest in improving the quality of education. Also, since local school committees may not place students in private facilities unless suitable education is unavailable in local public schools, it may be inferred that petitioners would have, at best, limited opportunities to teach students with the type of learning impairments found at the School in a traditional public school setting.[38] The question thus presented is whether, under these circumstances, the privacy interests of the School are sufficiently compelling to permit it to silence petitioners and thereby sever this vital link in the chain of communication between the classroom and the outside world.[39]

The School, of course, argues that it has the right to dictate what petitioners may or may not say to students, parents, or the community at large because it is a private institution, with rights of free association and private property. If the School were an ordinary private school, that argument would have more appeal. Society is undoubtedly better off for the fact that

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[38] In fact, the Affidavit of Petitioner Klug states, at paragraph 3: "The Town of Brookline...has no educational programs which can meet the special needs of the students which it refers to the School, within its public school system." J.A. 83. *See* note 13, *supra*.

[39] It is important to note that the censorship here was based strictly on the content of petitioners' speech. Thus, unlike *Marsh* or *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), the issue here is not whether petitioners will have to select a different time, place, or manner to communicate their message, but whether they will be heard at all.

private citizens who are dissatisfied with public education have the right to invest their time and money in the establishment of private schools and have done so. Such schools provide a healthy alternative to a homogeneous public school system. In fact, teachers who ordinarily choose to teach in such schools might very well do so for the express purpose of escaping from what they perceive to be the orthodoxy and bureaucracy of public education. For all these reasons, traditional private schools should ordinarily be given as much breathing room as possible, so as not to discourage concerned citizens from continuing to establish and support them.

The School is not, however, an ordinary private school. It is dependent upon the state for its students and funds, and thus for its very existence. Students who attend it did not, in any meaningful sense, choose it for its diversity, but because suitable public education was not available to them in their local public schools. By accepting these students and the public funds which accompanied them and assuming the responsibility for providing them with the education which is theirs by right, the School knowingly and willingly became part of the state's public education system and made itself accountable to the students, to their parents, and to all citizens whose tax dollars support that system. It did not have to do so. It need not do so in the future. But as long as the School continues to assume this responsibility for the education of the state's public school children, it cannot reasonably expect to enjoy the same privacy and free association rights as a truly private school.

It is therefore clear in this case that the rights of petitioners to express their opinions concerning matters affecting the education of students assigned to the School must prevail over the asserted right of the School to insist that petitioners maintain their silence. This is not to say that free speech is, in the abstract, more important than privacy or freedom of

association.[40] It is only to say that, in this particular clash of fundamental rights, it is both fair to the parties involved and in the best interest of society to afford petitioners the protection of the Fourteenth Amendment.

Conclusion

The judgment of the court of appeals in *Rendell-Baker*, affirming the judgment of the district court, should be reversed, and the case should be remanded for further proceedings. The judgment of the court of appeals in *Klug*, vacating the order of the district court and remanding with directions to dismiss the complaint, should be reversed, and the case should be remanded for further proceedings.

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[40] For example, given the same indicia of state action, the School's rights of privacy and association might well be entitled to priority over rights of free speech if the School's decision to discontinue purchasing supplies from an outspoken opponent of public education were challenged. This is yet another illustration of the point that the decision in a particular case will turn not just on the indicia of state action which are present or the type of rights which are at stake, but upon a careful analysis of interests in the context of the particular case in which they are asserted.

APPENDIX A

Constitutional, Statutory, and Regulatory Provisions

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Constitution, Declaration of Rights, Article VII:

Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

STATUTORY PROVISIONS

United States Code, Title 42, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (Supp. III 1979).

Massachusetts General Laws, Chapter 71B, Section 1:

The following words as used in this chapter shall, unless the context requires otherwise, have the following meanings: "Department", the department of education; "School age child", any person of ages three through twenty-one who has not attained a high school diploma or its equivalent; "School age child with special needs", a school age child who, because of temporary or more permanent adjustment difficulties or attributes arising from intellectual, sensory, emotional, or physical factors, cerebral dysfunctions, perceptual factors, or other specific learning disabilities or any combination thereof, is unable to progress effectively in a regular school program and requires special classes, instruction periods, or other special education services in order to successfully develop his individual educational potential; "Regular education", the school program and pupil assignment which normally leads to college preparatory or technical education or to a career; "Special education", educational programs and assignments, namely special classes, programs or services designed to develop the educational potential of children with special needs including but not limited to educational placements of children by school committees, the departments of public health, mental health, and youth services and the department of social services in accordance with the regulations of the

department of education; "School age child requiring special education", any child with special needs who requires special education as determined in accordance with the regulations set forth by the department.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 18. (9 Mass. Gen. Laws Ann. 184-85 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 2:

The department shall promulgate, in cooperation with the departments of mental health, public health and social services, regulations regarding programs for children with special needs including but not limited to a definition of special needs; provided, however, that such definition shall emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure the maximum possible development of a child with special needs, and, provided further, that such definition shall be sufficiently flexible to include children with multiple special needs. Children receiving or requiring special education shall be entitled to participate in any of the following programs: (1) additional direct or indirect instruction consultation service, materials, equipment or aid provided children or their regular classroom teachers which directly benefits children requiring special education; (2) supplementary individual or small group instruction or treatment in conjunction with a regular classroom program; (3) integrated programs in which children are assigned to special resource classrooms but attend regular classes to the extent that they are able to function therein; (4) full-time special class teaching or treatment in a public school building; (5) teaching or treatment at home; (6) full-time teaching or treatment in a special day school or other day facility; (7) teaching or treatment at a hospital; (8) teaching or treatment at a short or long term residential school; (9) occupational and pre-occupational training in conjunction with the regular occupational training program in a public school; (10) occupational and pre-occupa-

tional training in conjunction with full-time special class teaching in a public school building, at home, special day school or other day facility, hospital, or short or long-term residential school; (11) any combination or modification of programs (1) through (10) or other programs, services, treatments or experimental provisions which obtain the prior approval of the department.

Admission to such programs on the pre-school level at an earlier age than at which schooling is ordinarily provided shall be regulated by the department in conjunction with the departments of public health and mental health and shall be restricted to children with substantial disabilities who are judged by said departments to require such programming.

No child shall be assigned to a special education class unless it is first determined by an evaluation of the child's needs and the particular special education program that the child is likely to benefit from such program; periodically thereafter, and in no event less often than annually the child and his program shall be reevaluated to determine whether said child is benefiting from said program in accordance with the procedures set forth in section three. In the event that said program is not benefiting the child and that another program may benefit the child more, or said program has benefited the child sufficiently to permit reassignment, the child shall be reassigned, and in the event of consistent failure of a program to benefit children there assigned, the program shall be abolished or altered.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 19. (9 Mass. Gen. Laws Ann. 187-88 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 3:

In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the

department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special needs admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the

department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counselling services. When the suggested course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance with regulations promulgated jointly by the departments of education, mental health, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject

such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parents, guardians or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians or persons with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's

educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 20. (9 Mass. Gen. Laws Ann. 188-91 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 4:

The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district.

In the case of an agreement between school committees to jointly provide special education, said agreement shall designate one city, town or school district as the operating agent. Funds received by such operating agent from other cities, towns or school districts or appropriated by such operating agent for the purposes of such agreement, in addi-

tion to gifts and grants shall be deposited with and held as a separate account by its treasurer. The school committee may apply said funds to the costs of programs operated pursuant to the agreement without further appropriation.

St. 1972, c. 766, § 11. (9 Mass. Gen. Laws Ann. 193 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 5:

Any school committee which provides or arranges for the provision of special education pursuant to the provisions of section three shall pay for such special education personnel, materials and equipment, tuition, room and board, transportation, rent and consultant services as are necessary for the provision of such special education.

A school committee which incurs costs or obligations under the provisions of this section shall include within its annual budget an amount of money to comply with said provisions. Said amount shall be added to the annual budget appropriation for school purposes in each city or town for the support of public schools for the purposes of, and enforceable pursuant to, section thirty-four of chapter seventy-one, notwithstanding any general or special laws or charter provisions which limit the amount of money that may be appropriated in any city or town for school purposes.

St. 1972, c. 766, § 11, as amended by St. 1973, c. 318, § 1. (9 Mass. Gen. Laws Ann. 193 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 9:

The department, after consultation with the departments of mental health and public health, shall define the circumstances in which school committees may be required to provide special classes, instruction periods or other special education programs for school age children with special needs and shall provide standards for class size, curriculum, personnel and other aspects of special education for such children.

St. 1972, c. 766, § 11. (9 Mass. Gen. Laws Ann. 195-96 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 10:

The department may, on an annual renewal basis, upon the request of the parents or guardians and the recommendations of a local school committee and a regional branch of the division of special education, and with the approval of the secretary of educational affairs refer children requiring special education to any institution within or without the commonwealth which offers curriculum, instruction and facilities which are appropriate to the child's needs and which are approved by the department under regulations prescribed by the departments of education, mental health and public health. The curriculum at such an institution must for approval be equivalent, insofar as the department deems feasible, to the curriculum for children of comparable age and ability in the public schools of the commonwealth.

Before acting on said request the department shall determine the nature and extent of a child's special needs, shall require the local school committee and regional advisory council to prepare and submit plans detailing the time needed to establish facilities adequate for children with special needs in the city, town or school district where the child resides, and shall ascertain whether adequate facilities and instruction programs are available or when adequate facilities can be made available in the city, town or school district where the child with special needs resides. Until adequate facilities can be made available, such child shall be placed in the most adequate program available as determined by the department. The department shall further define by regulation the circumstances in which it shall be directly responsible for the placement of children in such special education programs, and by standards available to the public determine the methods and order of such placements; provided, however, that no child shall be denied access to any program operated by the department of mental health, public health or social services to which in the judgment of the operating department the child should be admitted.

The expenses of the instruction and support actually rendered or furnished to such children with special needs, including their necessary travelling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, may be paid by the commonwealth; but the department shall issue regulations jointly with the departments of mental health, public health, youth services and social services defining the circumstances in which the commonwealth shall bear all or part of such cost, the circumstances in which school committees shall be required to bear part or all of such cost, and the circumstances in which a parent or guardian may be required to reimburse the commonwealth for part or all of such cost; provided, however, that in no event shall the cost to the school committee for placement under this section be less than the average per pupil cost for pupils of comparable age within the city, town or school district; and, provided further, that in determining the cost to the parent or guardian, if any, no charge shall be made for any educational cost but only for support and care. In determining the cost to the parent or guardian the department shall apply criteria which take into account relative ability to pay.

The department shall direct and supervise the education of all such children, and the commissioner of education shall state in his annual report their number, the cost of their instruction and support, the manner in which the money appropriated therefor has been expended, to what extent reimbursed and such other information as he deems important.

Nothing contained herein shall affect the continued authority of the departments of mental health and public health over all non-educational programs and all treatment for residents or patients in institutions under their control.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 21. (9 Mass. Gen. Laws Ann. 196-97 (West Supp. 1981).)

REGULATORY PROVISIONS

603 Code of Massachusetts Regulations, Section 28, Paragraph 322.2 (1979):

Determination of need for special education; choice of prototype and program.

The Administrator of Special Education shall determine and state as part of the child's IEP whether the objectives set by the TEAM require for their achievement special education which is not available within the regular education program. The Administrator of Special Education shall state the reasons for the conclusion that the child does or does not require special education. If the child does require special education, the Administrator of Special Education shall complete the child's IEP by stating the prototype through which the child's program is to be provided and the specific program within such prototype. This decision regarding prototype and program shall be based on the type of services which are to be provided to the child, the types of group settings in which those services are to be provided (¶ 322.1(j)), the personnel who are to provide the services (¶ 322.3(a)), and the locations at which the services are to be provided (¶ 322.3(b)). The prototype selected shall be the least restrictive prototype which (by its terms set out in ¶ 502.0) allows the services recommended by the TEAM to be provided in the groups, by the personnel and at the locations chosen pursuant to ¶¶ 322.1(j), 322.3(a) and 322.3(b). Unless the child is to be placed in a Regional Adolescent Program under ¶ 502.7(b)(iv), the Administrator shall not select prototypes 502.7 (home or hospital), which is chosen only by a physician pursuant to ¶ 502.7(a); or 502.9 (diagnostic program) which is selected by the TEAM pursuant to ¶ 323.4. The Administrator of Special Education shall recommend a specific program and service for a child only after the evaluation of the adequacy of said program or service indicates that the program or service can provide elements required in the child's IEP.

603 Code of Massachusetts Regulations, Section 28, Paragraph 502.4(i) (1979):

Notwithstanding ¶ 502.4(h), a school committee may operate a substantially separate special education program in a facility other than a public school regular education facility, provided that the program is reviewed and approved by the Regional Branch Office of the Division prior to implementation. Such review and approval shall be required annually, as part of the school committee's annual program plan under ¶ 501.2. A program approved under this paragraph shall be considered more restrictive than a ¶ 502.4 program conducted in a public school regular education facility, and less restrictive than a program under ¶¶ 502.5 or 502.6. ...

603 Code of Massachusetts Regulations, Section 28, Paragraphs 804.0-804.6 (1979):

Requirements of contracts between school committees and private schools.

Each contract between a school committee and a private school, for the provision of all or part of the program of a child in need of special education, shall include the following requirements which such private school must meet:

804.1 The private school shall comply with all elements of the IEP for the child in need of special education and shall provide, in writing, to the Administrator of Special Education who recommended the placement, detailed documentation of such compliance. The private school shall send a copy of such documentation to the appropriate Regional Branch Office of the Division.

804.2 At least once every three months, the private school shall review the progress of each child in need of special education toward meeting the criteria, set by the Administrator of Special Education, for placement of such child in a less restrictive program prototype. If such child has met the criteria, the private school shall, in writing, so notify the Administrator of Special Education.

804.3 The private school shall allow the school committee which has placed a child in it to monitor and evaluate the education of such child in need of special education and shall make available to authorized school personnel from the responsible school system any records pertaining to the child in accordance with the Massachusetts Student Record Regulations.

804.4 The private school shall allow each school committee which has placed a child in it to inspect its facilities and to observe its operation at any reasonable time.

804.5 The private school shall comply with all other applicable requirements of these regulations, and the guidelines for approval of private schools, policy statements and directives issued by the Division in furtherance of this Chapter.

804.6 No school committee shall contract with any private school that discriminates on the ground of race, color, religion, or national origin, or that discriminates against qualified handicapped persons.